

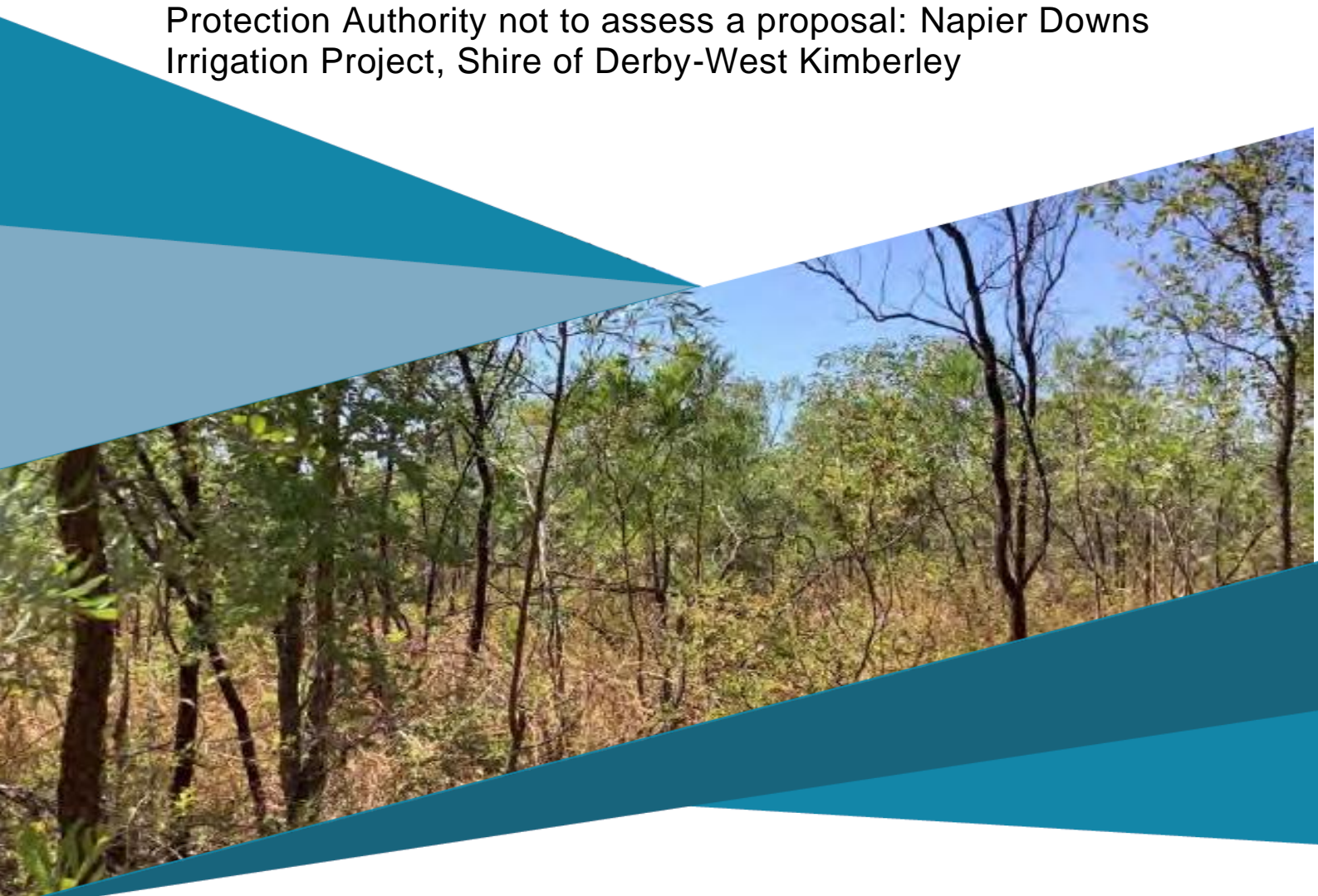


Government of **Western Australia**  
Office of the **Appeals Convenor**  
Environmental Protection Act 1986

# Appeals Convenor's Report to the Minister for Environment

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Appeals objecting to the decision of the Environmental Protection Authority not to assess a proposal: Napier Downs Irrigation Project, Shire of Derby-West Kimberley



<b>Appellants</b>	Environs Kimberley, Wilderness Society, Madanaa Nada Aboriginal Corporation RNTBC
<b>Proponent</b>	Napier Corporation Pty Ltd
<b>Authority</b>	Environmental Protection Authority (EPA)
<b>Appeal Numbers</b>	049.001-003 of 2023
<b>Date</b>	March 2024

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**Acknowledgement of Country**

The Office of the Appeals Convenor acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community.

We pay our respects to all members of the Aboriginal communities and their cultures, and to Elders past, present and emerging.

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# 1 Executive summary

## 1.1 Decision under appeal

This appeal is against the decision of the Environmental Protection Authority (EPA) not to assess a proposal by Napier Corporation Pty Ltd (proponent) to develop the Napier Downs Irrigation Project (the proposal) at the Napier Downs Station, located 240 kilometres (km) east-northeast of Broome in the Shire of Derby-West Kimberley (Figure 1).

**Figure 1** Location of the proposal – Napier Downs Station



(Source: Google Maps, February 2024)

The proposal includes the development and installation of 4 centre irrigation pivots with groundwater production bores, access tracks and associated infrastructure to produce fodder crops for pastoral purposes.

In June 2023, the proponent referred the proposal to the EPA.

In November 2023, the EPA released its decision not to assess the proposal and provided Public Advice on the environmental aspects of the proposal, and it was against this decision the appeals were received.

The Public Advice states:

The EPA notes that proposal involves groundwater abstraction from the Grant Group Aquifer, at a rate up to 3 GL/annum with a staged approach. Each pivot will have a total water demand of up to 750 megalitres/annum to meet crop water requirements. The EPA considered that potential impacts to groundwater dependent ecosystems as a result of the implementation of the proposal can be managed with an appropriate operating strategy that includes suitable triggers, thresholds and adaptive management actions. With appropriate development staging, monitoring and adaptive management legally enforceable through licence conditions, the potential impacts from groundwater abstraction can be managed under the RiWI Act.

The EPA considered the potential for impact associated with the clearing of native vegetation for the proposal and considers based on the types of vegetation present, and the mitigation measures in place, there are no significant residual impacts predicted for flora

and vegetation. The EPA notes that the types of impact associated with the clearing of native vegetation for the proposal, including potential indirect impacts to the Golden Bandicoot can be regulated under Part V Division 2 of the EP Act.

The EPA considered the potential for both direct and indirect impacts to Aboriginal Cultural Heritage values including those associated with groundwater dependent ecosystems, native flora and vegetation, and terrestrial fauna values. The EPA notes that the proponent has undertaken consultation with Traditional Owner groups and continues to engage with Traditional Owners on the development of a Heritage Protection Agreement. No concerns regarding impacts to cultural heritage values have been identified through this engagement and groundwater drawdown is not predicted to impact on any identified cultural heritage sites. An Aboriginal heritage survey was conducted on behalf of the Traditional Owners to inform the prediction of direct and indirect impacts to Aboriginal Cultural Heritage values and ongoing mitigation and management. No direct residual impacts to Aboriginal heritage sites or values are expected as a result of the proposal.

DWER will be notified of the EPA's decision for this proposal and the EPA's expectations of the outcome of their statutory decision-making process.<sup>1</sup>

We note the proposal is subject to other statutory requirements, including:

- Aboriginal cultural heritage under the *Aboriginal Heritage Act 1972* (AH Act) administered by the Department of Planning, Lands and Heritage (DPLH)
- *Rights in Water and Irrigation Act 1914* (RIWI Act) water licensing requirements administered by DWER
- pastoral lease diversification permit for the irrigation proposal under the *Land Administration Act 1997* (LA Act) administered by the Pastoral Lands Board.

## 1.2 Grounds of appeal and appellant concerns

The appellants are Environs Kimberley, the Wilderness Society and Madanaa Nada Aboriginal Corporation RNTBC (MNAC) (through HopgoodGanim Lawyers). The appellants raised a number of issues in relation to the EPA's decision not to assess the Napier Downs Irrigation Project, which are summarised in Table 1.

**Table 1** Grounds of appeal

Ground	Main concerns the appellant submitted
1 Golden bandicoot ( <i>Isoodon auratus auratus</i> )	<ul style="list-style-type: none"> <li>• the proposal has the potential to destroy a population of golden bandicoot</li> <li>• the proponent's referral information states there is potential for localised displacement and direct mortality of golden bandicoot</li> <li>• the proponent needs to demonstrate the significance of the population and how it is proposed to be maintained following the loss of 200 hectares (ha) of habitat.</li> </ul>
2 Groundwater drawdown impacts	<ul style="list-style-type: none"> <li>• impact of groundwater drawdown on the Devonian Group Aquifer and the Grant Group Aquifer, which may be connected</li> <li>• the proposal may be inconsistent with the government's recently announced Fitzroy policy prohibiting extraction of water from the Devonian and Alluvial aquifers</li> </ul>

<sup>1</sup> EPA, Public record pursuant to s. 39 of the *Environmental Protection Act 1986*, 1 November 2023.

Ground	Main concerns the appellant submitted
	<ul style="list-style-type: none"> <li>• impacts to groundwater dependent ecosystems (GDEs) from groundwater drawdown</li> <li>• lack of subterranean fauna and troglodfauna surveys undertaken for the proposal</li> <li>• the proponent's hydrogeological assessment referral information was not available for public comment</li> <li>• insufficient information provided to MNAC regarding potential impacts of groundwater drawdown.</li> </ul>
3 Aboriginal cultural heritage	<ul style="list-style-type: none"> <li>• consultation with traditional owners was inadequate</li> <li>• ethnographic sites and surveys were inadequate</li> <li>• risk of significant impacts from groundwater drawdown and irrigation activities on culturally significant fauna and flora</li> <li>• potential impacts from cane toads, which will affect the Warrwa peoples' rights and interests, were not adequately considered or addressed.</li> </ul>

### 1.3 Key issues and conclusions

The question for the Minister on appeal is whether, having regard for the concerns raised by the appellants, the EPA's decision not to assess the Napier Downs Irrigation Project was appropriate.

To answer this question, our investigation considered the grounds submitted by the appellants including the significance of potential impacts of the Napier Downs Irrigation Project on the environment and whether other statutory decision-making processes can mitigate these impacts in a manner that is consistent with the EPA's environmental objectives.

Having regard for the information presented during the appeal investigation, our conclusion is that the EPA was justified in determining that Napier Downs Irrigation Project does not warrant formal assessment under Part IV of the EP Act.

We summarise our conclusions for the grounds of appeal below. Section 2 of this report details our reasoning and Section 3 provides supporting information.

#### **Golden bandicoot (*Isoodon auratus auratus*)**

We note that the golden bandicoot is listed as vulnerable under the *Biodiversity Conservation Act 2016* (BC Act) and the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The proponent's Environmental Assessment and Management Plan (EAMP) states the proposed clearing of up to 200 ha represents 11% of the total mapped extent of suitable habitat for golden bandicoot in the proposal area and 1 km buffer.

Potential impacts from the proposal include local displacement and mortality of golden bandicoot during clearing, and increased predation from feral animals.

The EPA advised that potential impacts to golden bandicoot can be mitigated through the proponent's mitigation measures, which are outlined in section 2.1.

Section 38G(4) of the EP Act provides that in making its decision whether to assess a proposal, the EPA may have regard to 'other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment'.<sup>2</sup>

In this regard, we sought advice from DWER which stated that potential impacts to golden bandicoot and its habitat from clearing native vegetation for the proposal, can be adequately assessed and regulated (if approved) under Part V, Division 2 of the EP Act. DWER advised that any significant residual impact to threatened fauna habitat would not be approved if the impacts were considered irreversible and unable to be counterbalanced through management conditions, including environmental offsets.<sup>3</sup>

Noting the above, we agree with the EPA that impacts from clearing of native vegetation can be assessed by DWER through a clearing permit process, and that this is the best mechanism to assess impacts of the kind raised by this ground of the appeal.

If DWER's assessment of the clearing application indicates that the environmental risks posed are unacceptable, DWER can refuse to issue a permit, or can ensure conditions are attached to a permit which would mitigate the environmental impacts. We note that if approved, environmental offsets may be required where the clearing is assessed to have a significant residual impact.

### **Groundwater drawdown impacts**

From the available information, we note:

- the proposal involves groundwater abstraction from the Grant Group aquifer at a rate up to 3 gegalitres per year (GL/yr)
- the EPA advised that connectivity between the Grant Group and Devonian Reef aquifers is limited, and that groundwater abstraction from the Grant Poole aquifer (which includes the Grant Group) is consistent with the Government's recently published 'Water allocation planning in the Fitzroy Policy Position Paper'<sup>4</sup> (Fitzroy position paper)
- DWER advised that it is currently assessing the proponent's application for a groundwater licence under the RIWI Act
- DWER advised that the proponent's groundwater modelling and analysis, and a subsequent site inspection by DWER technical specialists, has demonstrated that potential indirect impacts to groundwater levels can be assessed and managed through DWER's groundwater licensing process
- DWER has requested that the proponent prepare a Water Resource Management Operating Strategy (WRMOS), which demonstrates the ability to manage groundwater drawdown impacts to local GDEs. The WRMOS is to include appropriate monitoring and a commitment to reduce, modify or cease abstraction if monitoring indicates that impacts to GDEs are occurring.

With regards to subterranean fauna (stygo fauna and troglifauna), the EPA noted that no surveys for subterranean fauna have been undertaken for the proposal. The EPA considered the proponent's desktop subterranean fauna risk assessment, which identified regional records of stygo fauna and troglifauna and concluded that habitat suitable for stygo fauna was present outside the proposal area.

<sup>2</sup> Western Australian Government, Western Australian Government Gazette No. 180, Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2021, 22 October 2021, Section 2.2.

<sup>3</sup> DWER, Advice on the appeals, 11 January 2024, page 3.

<sup>4</sup> Western Australian Government, Water allocation planning in the Fitzroy Policy Position Paper, October 2023.

In response to the appeals, DWER advised that given the expected groundwater drawdown from 3 GL/yr of abstraction and the extensive Grant-Poole aquifer, DWER considered that the stygofauna and troglifauna habitats will remain continuous and well-connected, with only localised impacts close to the production bores and not likely to be preferential habitat.

The EPA acknowledged concerns that the proponent's hydrogeological assessment referral information was not available for the 7-day public comment period. The EPA advised that the relevant information was subsequently made available and considered by the EPA while deliberating whether to assess the referral, and that all relevant information and reports are now available on the EPA website.

Noting the above, the EPA considered that any impacts from groundwater drawdown can be assessed and managed through DWER's water licensing process under the RIWI Act, and as such the EPA's objectives for Inland Waters and Subterranean Fauna can be met.

We accept the EPA's advice.

### **Aboriginal cultural heritage**

From the available information, we note that:

- the proposal is located within the Warrwa Part A Native Title Determination area, and that MNAC holds the determined native title on trust for the Warrwa people pursuant to the *Native Title Act 1993*<sup>5</sup>
- no registered Aboriginal cultural heritage sites are located within the proposal area, with the nearest registered site being 5.3 km to the east
- MNAC questioned the proponent's Aboriginal cultural heritage survey report, noting that the survey was limited to approximately 40 ha and did not cover the entire proposal area and did not include an ethnographic heritage survey as no Elder was present
- the proponent has obligations under the AH Act to ensure that no Aboriginal sites of significance are affected by the proposal
- the proponent has committed to enter into a Heritage Protection Agreement with the Warrwa people, which is expected to include:
  - site avoidance surveys prior to clearing of native vegetation (if approved)
  - relocation of infrastructure if significant Aboriginal cultural heritage sites are identified.
- the proponent has committed to amend the EAMP to include cane toad control in existing fauna management measures.

The EPA was satisfied that the AH Act can adequately assess and manage any potential impacts to Aboriginal cultural heritage to meet the EPA's objectives and did not consider EPA assessment of Aboriginal cultural heritage was warranted.

In addition, the EPA advised that:

- DWER's clearing application process includes a consultation process with direct interest stakeholders, which enables traditional owners to raise concerns about cultural heritage where it is directly affected by physical or biological impacts.
- DWER's water licence application process under the RIWI Act allows several factors to be taken into account, consistent with the consideration of Aboriginal cultural heritage, including public interest, detrimental effects on others, and environmental acceptability.

Noting the above, we consider that the EPA was justified in determining not to assess the proposal in relation to Aboriginal cultural heritage.

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<sup>5</sup> EPA, Response to the appeals, 8 February 2024, page 9.



## 1.4 Recommendation to the Minister

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We conclude that the EPA was justified in its decision not to assess the proposal and recommend that the appeals be dismissed.

## 2 Reasons for recommendation

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### 2.1 Golden bandicoot (*Isoodon auratus auratus*)

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The EPA's objective for the key environmental factor Terrestrial Fauna is 'To protect terrestrial fauna so that biological diversity and ecological integrity are maintained'<sup>6</sup>.

#### Threats to golden bandicoot include habitat loss

The published 'Conservation Advice for golden bandicoot' states:

The golden bandicoot was formerly widespread in western, central and northern Australia extending to western Queensland, New South Wales and Victoria (Friend 1990; Ellis et al., 1991). It is now extinct on the mainland except in a few locations in the north-west Kimberley between Mitchell Plateau in the north (McKenzie et al., 2008) and Yampi Peninsula in the south ...

The golden bandicoot occurs on the Kimberley mainland at Yampi Peninsula, Artesian Range, George Water and Prince Regent Nature Reserve, Western Australia.<sup>7</sup>

The Conservation Advice for golden bandicoot identifies that habitat loss and fragmentation; predation by feral cats and inappropriate fire regimes (among other things) are key threats to the species.

The proponent's Baseline Terrestrial Fauna Survey for the Napier Downs Irrigation Project (Fauna survey) states that the local population of golden bandicoot within the vicinity of the proposal area is considered to be important given it is on the southern edge of the species' range.<sup>8</sup>

#### EPA considers significance of impacts in deciding whether to assess a proposal

Under its Administrative Procedures, the EPA will have regard to the following matters when considering whether or not to assess a referred proposal: In making its decision, the EPA will have regard to matters including:

- the potential impacts of the proposal on the environment
- the significance of those impacts having regard to the EP Act environmental principles and the EPA's objectives for environmental factors
- whether the implementation of the proposal is likely to be consistent with the EPA's objectives for environmental factors.<sup>9</sup>

From our review of the available information, we note:

- the proposal will require clearing of up to 200 ha of native vegetation, including suitable habitat for populations of the golden bandicoot
- the potential impact of local displacement and mortality of golden bandicoot during clearing

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<sup>6</sup> EPA, Environmental Factor Guideline - Terrestrial Fauna, December 2016.

<sup>7</sup> Threatened Species Scientific Committee, Conservation Advice *Isoodon auratus auratus* Golden Bandicoot, 1 October 2015, page 1.

<sup>8</sup> Phoenix Environmental Services, Baseline Terrestrial Fauna Survey for the Napier Downs Irrigation Project, April 2023, page ii.

<sup>9</sup> EPA, Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2021, Section 2.2.

- the increased risk of predation of native fauna, including golden bandicoot, by introduced feral cats and dogs attracted to the irrigated site.<sup>10</sup>

In response to the appeal, the EPA advised that:

- it considered the significance of impacts to the listed golden bandicoot, including direct mortality and localised displacement
- the Fauna survey identified two golden bandicoot in the development envelope, one male and one female, with evidence of breeding and foraging within the development envelope
- DWER's Native Vegetation Regulation (DWER NVR) advised the EPA that the necessary surveys and studies have been completed consistent with required standards
- DWER NVR confirmed that the types of impacts associated with the clearing of native vegetation for the proposal, including impacts to the golden bandicoot, can be regulated under Part V Division 2 of the EP Act.

The EPA noted that potential impacts to the golden bandicoot can be mitigated through the proponent's mitigation measures, which include:

- avoidance of restricted fauna habitat type (open woodland (shrubby regrowth) over mixed herbs and grasses)) and seasonal soak containing open woodland of shrubby growth that is associated with golden bandicoots
- clearing will be staged in line with the pivot staging to reduce the scale of terrestrial fauna displacement
- feral cat and dog control is already undertaken on Napier Station. The existing management program will be reviewed and refined in response to risks identified in association with the proposal, including additional measures relating to cane toad control
- annual monitoring of the golden bandicoot population and feral animals will be undertaken to assess population persistence.<sup>11</sup>

The proponent's EAMP states that:

- 506.2 ha of Shrubland over grassland habitat is present within the application area, with 848.3 ha present within a 1 km buffer
- 75.9 ha of Open woodland habitat is present within the application area, with 411.8 ha present within a 1 km buffer
- Shrubland over grassland habitat and Open woodland habitat are both suitable for golden bandicoot
- the proposed clearing of up to 200 ha represents 11% of the total mapped extent of suitable habitat for golden bandicoot in the proposal area and 1 km buffer.<sup>12</sup>

The following fauna management measures are proposed in the EAMP:

- staging of clearing – clearing to be staged in line with the pivot staging to reduce the scale of fauna displacement
- feral animal control – feral cat and dog control is already undertaken on Napier Station. The existing management program will be reviewed and refined in response to risks identified in association with the proposal, including adding cane toad control to the existing program.
- monitoring – annual monitoring of the local golden bandicoot population and feral animals will be undertaken to assess population persistence for a sufficient period to demonstrate no significant impact to golden bandicoot.<sup>13</sup>

<sup>10</sup> Napier Corporation Pty Ltd, Napier Downs Irrigation Project Environmental Assessment and Management Plan, 6 June 2023, page 26.

<sup>11</sup> EPA, Response to the appeals, 8 February 2024, page 7.

<sup>12</sup> Napier Corporation Pty Ltd, Napier Downs Irrigation Project, Environmental Assessment and Management Plan, 6 June 2023, page 26.

<sup>13</sup> Ibid., page 27.

## **EPA can consider other decision-making processes in deciding whether to assess a proposal**

Section 38G(4) of the EP Act provides that in making its decision whether to assess a proposal, the EPA may have regard to:

- other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment.<sup>14</sup>

The EPA's published Interim Guidance – taking decision making processes into account in EIA<sup>15</sup> states that:

In applying sections 38G(4) or 44(2AA) of the EP Act, the EPA may take into account whether there is another statutory decision-making process, what that process is, and whether that process can mitigate the potential impacts of the proposal on the environment in a manner that is consistent with the EPA's environmental objectives.<sup>16</sup>

The EPA's Interim Guidance sets out the following matters that it may consider in relation to other statutory decision-making processes:

- ability of other decision-making processes to consider the impacts of the proposal
- process the other decision-making processes used to consider the potential environmental impacts:
- relevant considerations the other decision-making processes can take into account:
- conditions which may be applied
- likely outcomes – Are the EPA's objectives for environmental factors likely to be met through the other decision-making processes?
- overall conclusion – Is there a statutory decision-making processes which can mitigate the potential impacts of the proposal on the environment?

### **DWER advice**

We sought advice from DWER in relation to the appeals, which advised that:

- potential impacts to golden bandicoot and its habitat, from clearing native vegetation for the proposal, can be adequately regulated under Part V, Division 2 of the EP Act
- the impact of clearing of habitat for threatened species is a key consideration in the assessment process and the proponent will be required to demonstrate how avoidance and minimisation measures have been put in place to eliminate, reduce, or otherwise mitigate the need for, and scale of, the proposed clearing of native vegetation
- clearing of native vegetation which is assessed as having a significant residual impact on suitable habitat for threatened fauna species will not be approved if these impacts are considered irreversible and unable to be counterbalanced through management conditions, including environmental offsets.<sup>17</sup>

### **Conclusion**

Based on the above information, we agree with the EPA that impacts from clearing of native vegetation (and habitat for the threatened golden bandicoot) can be assessed by DWER through a clearing permit process, and that this is the best mechanism to assess impacts of the kind raised by this ground of the appeal.

<sup>14</sup> Western Australian Government, Western Australian Government Gazette No. 180, Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2021, 22 October 2021, Section 2.2.

<sup>15</sup> EPA, Interim Guidance - Taking decision making processes into account in EIA, October 2021.

<sup>16</sup> Ibid., page 2.

<sup>17</sup> DWER, Advice on the appeals, 11 January 2024, page 3.

If DWER's assessment of the clearing application indicates that the environmental risks posed are unacceptable, DWER can refuse to issue a permit, or can ensure conditions are attached to a permit which would mitigate the environmental impacts. We note that if approved, environmental offsets may be required where the clearing is assessed to have a significant residual impact.

We therefore recommended that this ground of appeal be dismissed.

## 2.2 Groundwater drawdown impacts

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The EPA's environmental objectives for the environmental factors Inland Waters and Subterranean Fauna are, respectively:

- To maintain the hydrological regimes and quality of groundwater and surface water so that environmental values are protected.<sup>18</sup>
- To protect subterranean fauna so that biological diversity and ecological integrity are maintained.<sup>19</sup>

In its Public Advice, the EPA identified potential impacts to inland waters and subterranean fauna from groundwater abstraction.

The appeals raised a range of detailed issues in relation to these environmental factors, which broadly relate to the following:

- impacts of groundwater drawdown on the Devonian Reef aquifer
- groundwater dependent ecosystems
- subterranean fauna
- referral information regarding groundwater.

### Impacts of groundwater drawdown on the Devonian Reef aquifer

The proponent's EAMP provides the following information:

- the proposal area is within the proclaimed Canning-Kimberley groundwater area under the RIWI Act
- the proposal area is within the Fitzroy water allocation plan area
- the proposal will target the Grant Group aquifer of the Canning Basin
- H3 hydrogeological assessment and modelling was conducted for up to 6 GL/yr based on an 8-pivot project initially, which was then revised down to 3 GL/yr for 4-pivots.

The recently published Fitzroy position paper, referenced in the appeals, outlines the State Government's policy positions for the Fitzroy River that have been developed following extensive consultation and informed by scientific studies.

Relevantly, Policy position 2 in the Fitzroy position paper states that the volume of groundwater available will not be more than the 108.5 GL/yr. Policy position 3 states that the Government will restrict access to the Alluvial and Devonian Reef aquifers due to the importance of these aquifers in supporting significant ecological, cultural and social values (refer to Table 2).

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<sup>18</sup> EPA, Environmental Factor Guideline – Inland Waters, June 2018.

<sup>19</sup> EPA, Environmental Factor Guideline – Subterranean Fauna, December 2016.

**Table 2** Fitzroy position paper – Policy positions 2 and 3<sup>20</sup>

Policy position	Description
2. The State Government supports the licensed take of groundwater only where it is shown to be sustainable.	Groundwater provides a reliable source of water where it can be taken sustainably. Access to groundwater will create opportunities for diversified or irrigated agriculture, including annual or perennial horticulture, broadacre crops, market or community gardens, bushfoods, and carbon farming. The volume of groundwater available and rules on how it can be accessed will be determined through the draft Fitzroy plan. The volume of groundwater available will not be more than the 108.5 gigalitres [per year] proposed in the Discussion paper.
3. The State Government will restrict access to Alluvial and Devonian Reef aquifers.	The Alluvial and Devonian Reef aquifers support significant ecological, cultural and social values. To protect these, the licensed take of water will be restricted under the draft Fitzroy plan. Only certain low-impact activities, such as drinking water for Aboriginal communities or for public assets, and existing water licences will be able to use these aquifers in future.

The EPA advised that:

Based on hydrogeological modelling undertaken by CSIRO, the Grant Group aquifer is interconnected primarily to the Poole Sandstone aquifer, with the Devonian reef aquifer being a separate aquifer. Analysis of water chemistry; however, indicates that there may be some limited input to the Grant Group aquifer from the underlying Devonian reef aquifer (DWER 2023)...It is acknowledged that there may be some limited connectivity between the Devonian Reef and Grant Group aquifers. However, any impacts to the Devonian reef aquifer (including indirect impacts to groundwater dependent ecosystems and cultural heritage values) supported by the Devonian Reef aquifer are expected to be able to be considered under the *Rights in Water Irrigation Act 1914* (RiWI Act) as part of the groundwater abstraction license application process.<sup>21</sup>

The EPA noted that the 108.5 GL/yr identified within the Fitzroy position paper is intended to be taken from the Grant Poole and Wallal aquifers while abstraction from Alluvial and Devonian Reef aquifers will be restricted.

The EPA was of the view that connectivity between the Grant Group and Devonian Reef aquifers is limited, and that groundwater abstraction from the Grant Poole aquifer is consistent with the Government's Fitzroy position paper.

During discussions with the appellants, the concern was raised that 3 GL/year is significant groundwater allocation for one project given the total allocation specified in the Fitzroy position paper is no more than 108.5 GL/yr.

In response, the EPA advised that within the Canning-Kimberley Groundwater Area 25 groundwater licenses to abstract approximately 1.3 GL/yr have been issued for the Canning-

<sup>20</sup> Western Australian Government, Water allocation planning in the Fitzroy Policy Position Paper, October 2023, page 6.

<sup>21</sup> EPA, Response to the appeals, 8 February 2024, page 2.

Grant aquifer. The EPA noted that if DWER issues the proponent a groundwater licence to abstract 3 GL/yr for the proposal, then the cumulative groundwater allocation in the Canning-Grant aquifer would be 4.3 GL/yr. The EPA was of the view that this would be consistent with the total allocation specified in the Fitzroy position paper of no more than 108.5 GL/yr.

DWER advised that it is currently assessing the proponent's application for a groundwater licence under the RIWI Act.

In its advice, DWER stated:

The Department's north-west region is responsible for groundwater licensing in the Kimberley. The region's advice to the EPA was that the site's water-related impact risks could be managed through the groundwater licence if the EPA decided not to assess the proposal. Groundwater modelling and analysis provided to the Department, and a subsequent site inspection by Department technical specialists, has demonstrated that potential indirect impacts to groundwater levels can be managed through a groundwater licence. The site is located sufficiently distant from the Devonian reef aquifer that drawdowns at the assessed rate (three gegalitres per annum (GL/a)) will not occur.<sup>22</sup>

We note DWER's advice.

### **Groundwater dependent ecosystems (GDEs)**

The EAMP states that:

- two aquatic GDEs, Ngooderoodyne Spring and Lennard River Pool, were identified by the hydrogeological assessment within the modelled area of groundwater drawdown
- a third nearby GDE, Hawkstone Creek, is a surface water site and any residual pools at the end of each wet season are highly unlikely to be connected to groundwater.<sup>23</sup>

Figure 3 in section 3.1, shows the proposal's modelled area of groundwater drawdown for 3 GL/year abstraction at 10 years, and the location of local hydrological features.

In the EAMP, the proponent commits to monitoring and managing impacts to the above GDEs through a WRMOS, which is currently in preparation.

Relevant management measures outlined in the EAMP include:

- groundwater monitoring of water level and water quality impacts within and beyond the irrigation area, at Ngooderoodyne Spring, Lennard River pool, and precautionary monitoring at Hawkstone Creek
- vegetation health monitoring where drawdown levels are greater than predicted at Ngooderoodyne Spring, Lennard River pool and Hawkstone Creek. Baseline vegetation health monitoring sites, both control and impact sites, to be established prior to any groundwater drawdown
- an adaptive management plan, which includes a requirement to reduce, move or cease abstraction if monitoring identifies that monitored vegetation is negatively impacted.<sup>24</sup>

The EPA advised that:

The DWER is currently reviewing the Napier Down's groundwater licence application and WRMOS for 3 GL/annum from the Grant group aquifer. In October 2022, DWER requested the proponent to prepare a WRMOS that demonstrates an ability to manage the impact of abstraction to the groundwater dependent Ngooderoodyne Spring, Lennard River Pool,

<sup>22</sup> DWER, Advice on the appeals, 11 January 2024, page 2.

<sup>23</sup> Napier Corporation Pty Ltd, Napier Downs Irrigation Project, Environmental Assessment and Management Plan, 6 June 2023, page 16.

<sup>24</sup> Ibid, page 28.

Hawkstone Creek (Long Pool) and priority ecological community riparian vegetation fringing both watercourses. The EPA notes this was to include appropriate monitoring and a commitment to reduce, modify or cease abstraction if monitoring indicates that impacts to GDEs are occurring.<sup>25</sup>

In its advice, DWER advised that:

The proposal may have potential impacts to groundwater dependent vegetation, unless managed adaptively. As a result of the site visit, the Department has established a suitable groundwater monitoring regime to set conservative (highly protective) monitoring and drawdown triggers to protect pools and springs (including at some sites not identified in the referral). The monitoring program will be refined over the next six months, and the licensee will be encouraged to provide the updated development and monitoring programs to interested parties, including Traditional Owner groups.<sup>26</sup>

### Subterranean fauna

The EPA's Environmental Factor Guideline – Subterranean Fauna (Subterranean Fauna EFG) defines subterranean fauna as fauna which live their entire lives (obligate) below the surface of the earth, and are divided into two groups:

- stygofauna – aquatic and living in groundwater
- troglofauna – air-breathing and living in caves and voids.<sup>27</sup>

The appellants raised concerns that no subterranean fauna and troglofauna surveys were undertaken for the proposal. During discussions, the appellants noted there is limited survey information on subterranean fauna available for the Kimberley region. The appellants submitted that the proponent should be required to undertake subterranean fauna surveys inside and outside of the modelled groundwater drawdown area of the proposal.

In response, the EPA advised that:

The EPA recognises that no surveys for subterranean fauna have been undertaken to date. The EPA acknowledges there is limited data to inform the diversity and distribution of subterranean fauna species due to the absence of surveys and sampling across much of the region. However, the EPA considered the proponent's desktop subterranean fauna risk assessment ... which identified regional records of stygofauna and troglofauna and concluded that habitat suitable for stygofauna was present outside the proposal area.

The proposal does not include the removal of habitat for troglofauna; however, the proponent has advised that indirect impacts to troglofaunal habitat may occur through a reduction in groundwater overtime that may result in localised changes to humidity, potentially affecting the suitability of habitats for troglofauna at a local scale.<sup>28</sup>

The EPA sought advice from DWER's Terrestrial Ecosystems Branch, which advised that:

... the scale and nature of the impacts are relatively limited (up to 5 m across less than 1 km) in relation to the available extent of potential stygofauna habitat beyond the predicted area of groundwater drawdown and based on the reduced abstraction from 6 GL to 3 GL, the proponent's conclusion that impacts to stygofauna will be 'negligible' is likely to be valid.<sup>29</sup>

<sup>25</sup> EPA, Response to the appeals, 8 February 2024, page 4.

<sup>26</sup> DWER, Advice on the appeals, 11 January 2024, page 2.

<sup>27</sup> EPA, Environmental Factor Guideline – Subterranean Fauna, December 2016, page 1.

<sup>28</sup> EPA, Response to the appeals, 8 February 2024, page 4.

<sup>29</sup> Ibid., page 4.



In response to the appeals, DWER advised that given the expected groundwater drawdowns from 3 GL/yr of abstraction and the extensive Grant-Poole aquifer, DWER considered that the stygofauna and troglifauna habitats will remain continuous and well-connected, with only localised impacts close to the production bores and not likely to be preferential habitat.<sup>30</sup>

Based on the above, the EPA was of the view that the proposal is not likely to have a significant impact on Inland Waters or Subterranean Fauna and is likely to be consistent with its environmental objectives for these factors. We accept the EPA's advice.

### Referral information regarding groundwater

The appellants raised concerns that the proponent's hydrogeological assessment referral information was not available for public comment. MNAC submitted that insufficient information was provided regarding potential impacts of groundwater drawdown.

In response, the EPA advised that:

While the modelling reports and appendices were not included as part of the original referral and thus were not available for the 7-day public comment period, they were provided to DWER in response to a request for further information and were considered by the EPA in their decision making. All relevant information and reports are now available on the EPA website.

...

This information is now available on the EPA website:

- Appendix 2 H3 hydrogeological assessment
- Appendix 3 flora and vegetation survey
- Appendix 4 reconnaissance survey of potential groundwater associated values,
- Appendix 5 terrestrial fauna surveys
- Appendix 6 subterranean fauna risk assessment
- Appendix 7 model simulation of alternative pumping Scenarios
- Appendix 8 conceptual groundwater diagrams of GDEs.<sup>31</sup>

We note the EPA's advice.

### Conclusion

Noting the above, and in particular advice received from DWER that the proposal's groundwater related impact risks can be assessed and managed through DWER's water licence application process under the RIWI Act, we consider that the EPA's assessment of the matters raised under this ground of appeal was appropriate.

We therefore recommended that this ground of appeal be dismissed.

## 2.3 Aboriginal cultural heritage

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The EPA's objective for the key environmental factor Social Surroundings is 'To protect social surroundings from significant harm'<sup>32</sup>.

The EPA's Environmental Factor Guideline – Social Surroundings (Social Surroundings EFG) states that:

<sup>30</sup> DWER, Advice on the appeals, 11 January 2024, page 2.

<sup>31</sup> EPA, Response to the appeals, 8 February 2024, page 5.

<sup>32</sup> EPA, Environmental Factor Guideline – Social Surroundings, November 2023.

Under the EP Act, the EPA is required to consider social surroundings to the extent to which they directly affect or are affected by physical or biological surroundings. This may include impacts to Aboriginal cultural heritage (ACH) values through physical ground disturbance, changes to culturally significant ground or surface water resources, significant dust emissions received at ACH places, ecological impacts to culturally significant flora and fauna (such as flora or fauna used for bush tucker or teaching), or significant visual impacts to ACH cultural landscapes.<sup>33</sup>

The Social Surroundings EFG notes that the interaction of the EP Act and the AH Act for environmental impact assessment purposes is set out in the EPA's Technical Guidance: Environmental impact assessment of Social Surroundings – Aboriginal cultural heritage<sup>34</sup>.

Noting that the AH Act is about preserving places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, the Social Surroundings EFG states:

Where AH Act 1972 processes are not reasonably likely to meet the EPA's objectives for social surrounding and ACH values, such as the AH Act 1972 does not apply to a particular place or impact, an EPA assessment may still be required.<sup>35</sup>

From our review of the available information, we note:

- The development envelope is located wholly within the Warrwa Combined Part A Determination (WCD2020/010) area ('Warrwa Part A Native Title Determination area'). MNAC holds the determined native title on trust for the Warrwa people pursuant to the *Native Title Act 1993*.<sup>36</sup>
- No sites registered in the Department of Planning, Lands and Heritage (DPLH) Aboriginal Cultural Heritage Inquiry System are located within the proposal development envelope. The nearest registered Aboriginal cultural site was identified to be Hawkstone Peak (Aboriginal Site 14594), 5.3 km to the east.
- In September 2021, an Aboriginal cultural heritage survey was conducted by Fenackling Consult with two Warrwa traditional owners and the proponent's representative at the proposed location of one pivot in the Scrubby Creek Paddock. Fenackling Consult provided the proponent with a survey report (Fenackling survey report) in April 2022.

## Appellant's concerns

By their appeal, MNAC noted the following information and concerns:

- MNAC informed the proponent on a number of occasions that Aboriginal cultural heritage and ethnographic heritage surveys are needed over the entire proposal area
- impacts on tangible and intangible Aboriginal cultural heritage, the Warrwa peoples' native title rights and interests, risks to culturally significant flora and fauna (including bush tucker and medicine) from significant groundwater extraction and clearing, and incursion of invasive pests such as cane toads
- Fenackling Consult (on behalf of MNAC) recently completed cultural heritage surveys in close proximity to the proposal location and identified significant ethnographic sites, which indicates that the proposal may encroach on ethnographically sensitive areas
- the disturbance to songlines will interfere with the Warrwa peoples' native title rights and interests. Songlines are associated with the creation story, connecting places and

<sup>33</sup> EPA, Environmental Factor Guideline – Social Surroundings, November 2023, page 2.

<sup>34</sup> EPA's Technical Guidance: Environmental impact assessment of Social Surroundings – Aboriginal cultural heritage, November 2023.

<sup>35</sup> Ibid., page 2.

<sup>36</sup> EPA, Response to the appeals, 8 February 2024, page 9.

creation events. Interference with songlines (including through changes to the landscape and visual amenity of the area) will directly impact the Warrwa peoples' spiritual connection to the land.<sup>37</sup>

### Consultation with traditional owners, and ethnographic sites and surveys

In response to MNAC's appeal, the proponent advised that:

- the Fenackling survey report examined ethnographic heritage and found no areas of ethnographic concern in the proposal area
- the Fenackling survey report found no archaeological or ethnographic sites within the proposal area and concluded low likelihood of containing any archaeological sites.
- the proponent is engaging the Warrwa people in respect of a heritage protection agreement, and the proponent is committed to agreeing a process for future heritage surveys and costs as part of finalising an agreement
- the Warrwa Combined Part A Determination (Determination) was determined with effect on 1 December 2020 and the proposal is located within the Determination area where 'non-exclusive native title rights' exist (Non-Exclusive Area)
- the proponent's interests as a pastoralist prevail over the native title rights and the native title rights and interests cannot prevent activities permitted under Other Interests, such as the Pastoral Leases. To the extent the proponent requires the ability to use water, which is a use associated with the pastoral lease, it follows such use should be regarded as a use permitted by the Determination.<sup>38</sup>

In its response, the EPA advised that:

The proponent will require consent from the Minister of Aboriginal Affairs to alter Aboriginal sites under *Aboriginal Heritage Act 1972* (AH Act) in areas likely to be directly affected by the proposal. The EPA is satisfied that this process can mitigate potential impacts to Aboriginal sites to meet the EPA's objectives in that area because:

- The Aboriginal Cultural Heritage Committee must evaluate the importance and significance of the sites and make a recommendation to the Minister for Aboriginal Affairs before the alteration occurs.
- The Minister for Aboriginal Affairs' consent is required before the alteration occurs.
- New information about Aboriginal sites which are found after a consent has been granted must be notified to the Minister for Aboriginal Affairs.
- The consultation policy (DPLH 2023) for the AH Act expects that all relevant Traditional Owners are consulted before consent is considered.
- Provisions relating to the protection of Aboriginal sites apply even if sites or relevant heritage features are not registered or lodged with DPLH.
- The AH Act makes it an obligation to report Aboriginal cultural sites or objects to DPLH.
- Consent can include conditions for the protection, mitigation or management of sites in the consent area.
- Relevant Traditional Owners can apply to the State Administrative Tribunal for a review of the Minister's decision.<sup>39</sup>

In relation to consultation with MNAC, the EPA advised that:

<sup>37</sup> Madanaa Nada Aboriginal Corporation RNTBC, Appeal form, 27 November 2023.

<sup>38</sup> Napier Corporation Pty Ltd, Response to the appeals, 6 February 2024.

<sup>39</sup> EPA, Response to the appeals, 8 February 2024, page 8.

The proponent is seeking to enter into a Heritage Protection Agreement with the Warrwa people for the management of potential impacts to ACH. The agreement is expected to include a commitment to further consultation with the Warrwa people prior to the clearing of each pivot regarding the need for site avoidance surveys (Fenackling Consult 2021). In addition, the proponent has committed to the establishment of a site avoidance standard such that if, when and where ACH sites are identified during site avoidance surveys, infrastructure will be relocated (Napier Corporation Pty Ltd 2023).

In considering the unsurveyed areas of the proposal, the EPA took into account the proponent's mitigation measures, the commitment to avoid ACH sites identified during pre-clearance surveys, the commitment to ongoing consultation and the development of a Heritage Protection Agreement. These measures, combined with the AH Act 1972 for alteration of Aboriginal sites, and that the EPA was satisfied that the degree of physical or biological impacts and associated risk of Aboriginal cultural heritage was not likely to be significant, meant that the EPA did not consider EPA assessment of cultural heritage was warranted.<sup>40</sup>

In this regard, the proponent's EAMP states:

Napier Corporation is committed to the protection of Aboriginal cultural heritage and is aware of its obligations under the *Aboriginal Cultural Heritage Act 2021* [now AH Act]. It will continue to consult with the Warrwa traditional owners to agree a framework for the ongoing management of Aboriginal cultural heritage, including the reporting of any potential sites or artefacts of cultural significance should any be discovered during operation of the proposal.<sup>41</sup>

## Culturally significant fauna and flora

In relation to environmental risks to Aboriginal cultural heritage, the EPA advised that:

- DWER's clearing application process includes a consultation process with direct interest stakeholders, which enables traditional owners to raise concerns about cultural heritage where it is directly affected by physical or biological impacts. Any permit which is granted may include conditions that protect the environment and associated Aboriginal cultural heritage values. For example, conditions may be added to a permit to mark the location of culturally significant vegetation as avoidance areas<sup>42</sup>
- DWER's water licence application process under the RIWI Act allows several factors to be taken into account, consistent with the consideration of Aboriginal cultural heritage, including public interest, detrimental effects on others, and environmental acceptability. The RIWI Act water licensing process is likely to be able to include conditions which protect the environment affected by groundwater use to the extent necessary to protect Aboriginal cultural heritage values that are associated with it from significant harm.<sup>43</sup>

In this regard, DWER advised that:

As described in the Department's Factsheet (No. 22) *Assessment of Aboriginal heritage values for native vegetation clearing applications*, where Aboriginal heritage values are identified within a clearing permit application area, it is the applicants' responsibility to comply with their obligations under the AH Act. If the Aboriginal heritage values are related

<sup>40</sup> EPA, Response to the appeals, 8 February 2024, pages 9 to 10.

<sup>41</sup> Napier Corporation Pty Ltd, Napier Downs Irrigation Project, Environmental Assessment and Management Plan, 6 June 2023, page 19.

<sup>42</sup> EPA, Response to the appeals, 8 February 2024, page 8.

<sup>43</sup> Ibid., page 12.

to native vegetation, the decision on whether to grant a clearing permit will have regard to the significance of the impacts.<sup>44</sup>

### **Cane toads**

MNAC raised concerns that the proposal may lead to an incursion of cane toads, which will impact native flora and fauna and affect the Warrwa peoples' rights and interests. MNAC submitted that the proposal will create optimal breeding conditions for the pest through clearing of native vegetation and surface ponding from irrigation.

We note that the Fauna survey detected cane toads in the study area during field surveys.<sup>45</sup>

The EPA advised that cane toads require constant access to moisture to survive and given the region's climate and that any pooling from irrigation will be temporary, the proposal is unlikely to cause an increase in cane toads.

In this regard, the EAMP outlines the proponent's fauna management measures, including:

Feral animal control – feral cat and dog control is already undertaken on Napier Station. The existing management program will be reviewed and refined in response to risks identified in association with the proposal, including adding cane toad control to the existing program.<sup>46</sup>

### **Conclusion**

Taking the above information into account, we consider the issues raised by this ground of appeal have been adequately examined by the EPA, and that potential impacts to Aboriginal cultural heritage can be adequately assessed and managed by the AH Act.

We therefore recommended that this ground of appeal be dismissed.

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<sup>44</sup> DWER, Advice on the appeals, 11 January 2024, page 4.

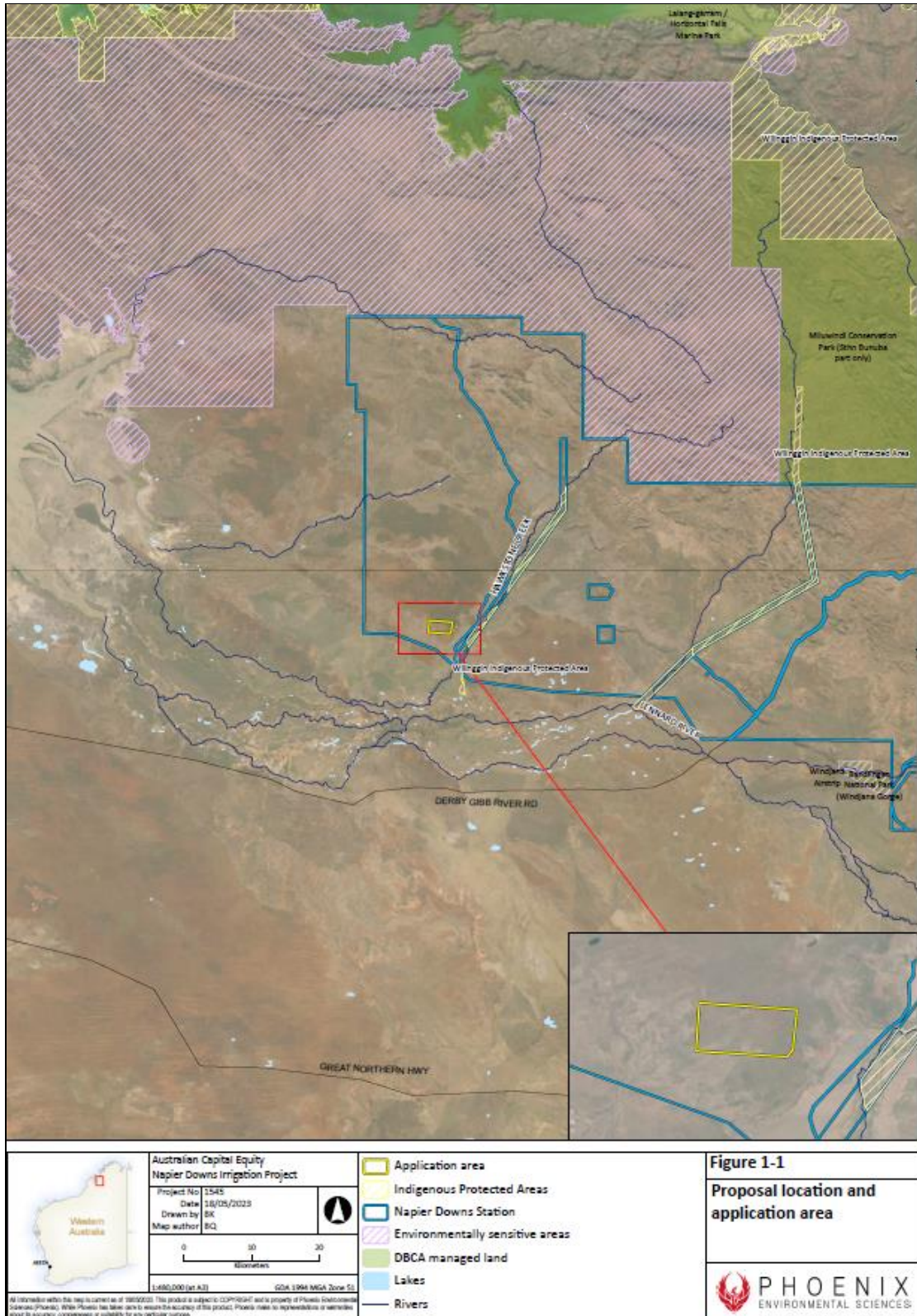
<sup>45</sup> Phoenix Environmental Services, Baseline Terrestrial Fauna Survey for the Napier Downs Irrigation Project, April 2023, page 53.

<sup>46</sup> Napier Corporation Pty Ltd, Napier Downs Irrigation Project, Environmental Assessment and Management Plan, 6 June 2023, page 27.

### 3 Supporting information

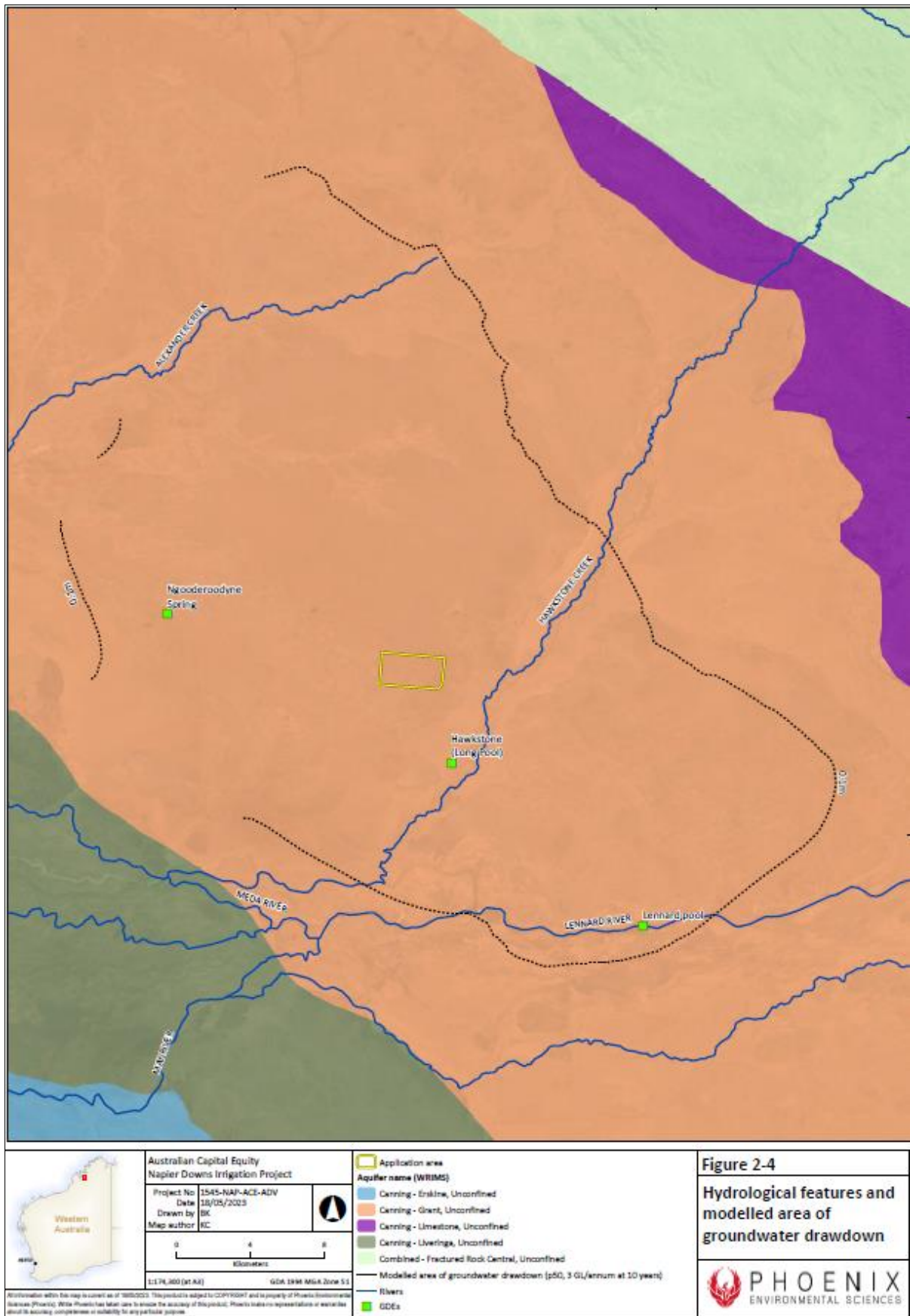
#### 3.1 Maps

**Figure 2** Application area of the proposal located within Napier Downs Station



(Source: Napier Corporation Pty Ltd, June 2023)

**Figure 3** Modelled area of groundwater drawdown; 3 GL/year at 10 years



(Source: Napier Corporation Pty Ltd, EAMP, June 2023)

## Appendix 1 Appeal process

### The Minister assesses the merits of a decision

Environmental appeals follow a merits-based process. This means the Minister can consider all the relevant facts, law and policy aspects of the decision and decide whether it was correct and preferable.

For appeals in relation to an EPA decision not to assess, the Appeals Convenor considers questions of environmental significance, relevance of factors, additional information not considered by the EPA, and whether other statutory decision-making processes can adequately address the relevant environmental factors without the need for formal assessment by the EPA. The level of public interest may also be relevant.

### We report to the Minister, as does the decision-making authority

To decide an appeal's outcome, the Minister for Environment must have a report from both:

- the Appeals Convenor [see section 109(3) of the EP Act], and
- the authority that originally made the decision under appeal [see section 106(1)].

To properly advise the Minister in our report, our investigation included:

- reviewing the EPA's determination and response to the appeals
- reviewing DWER's advice for the appeals
- reviewing the proponent's response to the appeals and referral documentation
- meetings with the proponent (7 December 2023 and 19 February 2024)
- meetings with the appellants
- reviewing documents and other information, policy and guidance as needed.

**Table 3** Documents we reviewed in the appeals investigation

Document	Date
Department of Water and Environmental Regulation, Response to the appeals	11 January 2024
Environmental Protection Authority, Response to the appeals	8 February 2024
Napier Corporation Pty Ltd, Referral information available at: <a href="#">Napier Downs Irrigation Project   EPA Western Australia</a>	
Napier Corporation Pty Ltd, Napier Downs Irrigation Project, Environmental Assessment and Management Plan	6 June 2023
Napier Corporation Pty Ltd, Response to the appeals	6 February 2024
Western Australian Government, Western Australian Government Gazette No. 180, Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2021	22 October 2021
Western Australian Government, Water allocation planning in the Fitzroy Policy Position Paper	October 2023